



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12724/2018

THE IMMIGRATION ACTS

Heard at Field House
On 15 April 2019

Decision & Reasons Promulgated
On 07 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

Master [M Y]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Ms Holmes (Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Master [MY], a citizen of Ghana born 21 December 2011, against the decision of the First-tier Tribunal (Judge Smith) of 15 January 2019 dismissing his appeal on human rights grounds, itself brought against the refusal of his human rights claim of 10 May 2018.

2. On 5 February 2018 the Appellant applied for leave to enter the UK as a child to join his father, also called [MY], in the UK. The Appellant's mother is [LY]. The application was made on the basis that the Sponsor and his wife had decided to ease the pressure on the Sponsor's grandmother, [CN], who had been taking care of the boy in recent years but was getting older, suffered from a health condition, and found childcare increasingly difficult given that she worked. The application form stated "I need [M] to be with me is father and son bondage which we have not had since he was born - I only see him 3 weeks in a year or two and also have the same bond with his big sister and baby brother as a father I need all my kinds to be one and ensure none of them get advantage over the others ..."
3. The application was refused because there was no evidence of the Sponsor's involvement in his son's life beyond providing for him financially: this was not enough to demonstrate either sole responsibility or serious and compelling reasons rendering the boy's exclusion undesirable.
4. The Appellant wrote a further letter by way of a reply to the Entry Clearance Manager's refusal stating that his mother was ageing and diabetic. She worked exceptionally long hours, from 5am, leaving [M] alone until he started school at 7:45am; he had had reports that his son rode motorbikes without a helmet, which made him fear for the possibility of losing his child. He always visited his son's school during his visits to Ghana to keep their bond alive, and paid termly fees. He would take his son shopping, play with him, watch television together and play games. He worried about the boy being bullied at school (including by the teachers: he had made arrangements to change his school after a teacher hit him with a book) and about his welfare generally. The prospective husband of [M]'s mother did not want to foster him and he had sent his son to his grandmother because he feared for his welfare.
5. The First-tier Tribunal remarked upon the paucity of material supporting the appeal. The evidence showed that the Appellant lived in Ghana with his paternal grandmother. The Sponsor had two other children, born in the UK on 11 August 2010 and 14 November 2015. The Sponsor had written a letter to the Tribunal in December 2018 stating that he had spent 3 weeks in Ghana with his son each year since the boy had been born. A statutory declaration from the Appellant's mother consented to him travelling to the UK.
6. The First-tier Tribunal found that there were discrepancies in the evidence:
 - (a) The statements that the Sponsor visited his son annually (in the letter to the Tribunal) and "3 weeks in a year or two" (in the application form) were inconsistent;

- (b) The claim to have regularly travelled to visit his son was inconsistent with the Sponsor's statement that there was a lack of a solid bond between him and his son.
7. Furthermore a letter from Southeastern Montessori School of November 2018 referred to the school fees being paid but did not identify by whom (a bill for school fees of September 2018); there was no reference to any involvement by the Sponsor with the school. The Appellant's mother's letter did not reference any involvement by the Sponsor in his son's upbringing. Accordingly the First-tier Tribunal rejected the Sponsor's claim that he had sole responsibility for his son's upbringing; it also found that there were no serious and compelling circumstances evinced that would require the grant of entry clearance. Accordingly the refusal of the Appellant's entry clearance application was a lawful reaction to the human rights issues that it raised.
 8. The Sponsor drafted grounds of appeal to the Upper Tribunal, via the First-tier Tribunal, arguing that he had intended to say that he sometimes spent two weeks and sometimes three weeks with his son. He would be able to produce further evidence of paying the school fees himself if required; he believed that schools in Ghana did not have a developed system for issuing receipts, but would nevertheless revert to the school. His mother was not able to pay for the boy's school fees or upkeep.
 9. Permission to appeal was granted by the First-tier Tribunal on 21 February 2019 on the basis that the "exceptionally brief" findings were arguably legally inadequate and that the Judge may well have erred in finding an inconsistency where in truth the evidence did not disclose any such thing.
 10. The Appellant did not appear before me. A letter apologised for his absence, which was said to be on account of his visiting his son in Ghana, but no adjournment application was made. I note that the appeal was previously determined without a hearing. In these circumstances I consider that the interests of justice required the appeal to be determined in the Appellant's absence. Ms Holmes submitted that there was inadequate evidence available to establish that the mother had truly relinquished parental responsibility, and that the facts underlying the application were simply too unclear for the Appellant's case to prevail.

Findings and reasons

11. I do not accept that there was a material error of law in the decision of the First-tier Tribunal for the following reasons.
12. It is true, as the Judge granting permission remarked, that the reasons provided by the First-tier Tribunal are relatively brief. However, the adequacy of reasons must be assessed by reference to the material before the

Judge. This is an appeal where there was little by way of supporting evidence. I accept that the finding as to there being a discrepancy in the evidence was rather tough given the Appellant was unrepresented and that the evidence was broadly consistent. However, had he opted for an oral hearing below he would have had the chance to explain himself more fully, and to that extent he is the author of his own misfortune. It is not for the Judge to reach the most favourable possible conclusion on the available evidence to one side or another; their job is to make reasoned and rational findings on the material before them. It may be the true circumstances can be adequately explained by clearer evidence in the future, but I do not consider that this finding was irrational given the available material.

13. The admission of the Appellant is governed by immigration rule 297, which so far as relevant to the issues in dispute provides:

“The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

...

(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or

(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care;”

14. So there were two routes potentially available for the Appellant and Sponsor here, sole responsibility and serious reasons making exclusion undesirable. The latter route represents a relatively high threshold, and can usefully be assessed by reference to the Secretary of State's statement of policy in SET 7.9 set out in *SG (child of polygamous marriage) Nepal* [2012] UKUT 265 (IAC) which sets out these relevant considerations:

“The ECO should consider all the evidence as a whole, deciding each application on its merits:

- Are the circumstances surrounding the child exceptional in relation to those of other children living in that same country?
- Are there emotional/physical factors relating to the sponsoring parent in the United Kingdom?
- Are there mental/physical factors relating to the non-sponsoring parent? Where the physical/mental incapability of the non-sponsoring

parent has been established, an entry clearance should normally be granted.

But not considered acceptable as a serious and compelling reason under this provision:

· that the UK offered a higher standard of living than in the child's own country".

15. The First-tier Tribunal did not refer to this limb of the relevant Rules, which was indubitably an error of law. However, it was not a material one, for there was virtually no evidence before the First-tier Tribunal to make out a viable claim based on the undesirability of the Appellant's exclusion: there was no detailed explanation of his present living arrangements and nor was there any detailed explanation as to the reasons why his non-sponsoring parent could not assist with his care.

16. As to sole responsibility, as noted by the Deputy President in *TD Yemen* [2006] UKAIT 00049:

"13. A central part of the notion of "sole responsibility" for a child's upbringing is the UK-based parent's continuing interest and involvement in the child's life, including making or being consulted about and approving important decisions about the child's upbringing." Referring to *Nmaju* [2001] INLR 26, the *TD Yemen* Tribunal went on to state at [30]: "The Court of Appeal saw "sole responsibility" as a practical (rather than exclusively legal) exercise of "control" by the UK-based parent over the child's upbringing and whether what is done by the carer is done "under the direction" of that parent.

17. The Deputy President went on to discuss relevant considerations when assessing sole responsibility applications:

"iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.

v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.

vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.

vii. In the circumstances likely to arise, day-to-day responsibility (or decision-making) for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and child.

- viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.
- ix. The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole".

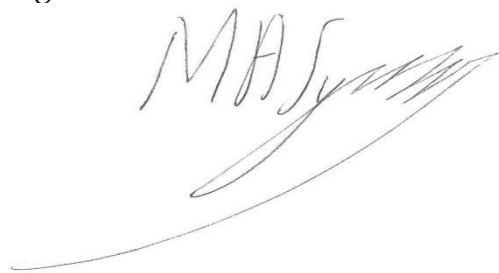
- 18. Again, there was very little evidence available to the Judge below. There is an issue regarding the availability of the mother as a source of care. She consented to the Appellant's travel to the UK, indicating that she has some role by way of parental responsibility. Where the non-sponsoring parent is alive and in theory available to care for a child, a "sole responsibility" case is rather difficult to make out. Cogent evidence is required to show that a parent who is in the background has no responsibility for their child's care, whether or not they live with the child. It is not for the First-tier Tribunal to speculate as to the family background.
- 19. Appeals to the Upper Tribunal are wholly limited (when assessing whether the Judge of the First-tier Tribunal erred in law) to the evidence that was before the First-tier Tribunal. The Appellant's grounds of appeal, understandably given he is not professionally represented, essentially make assertions that amount to fresh evidence. They do not assist in showing that the Judge below erred in his treatment of the evidence that was before him.
- 20. For these reasons I consider that the appeal must be dismissed.

Decision

The appeal is dismissed.

Signed

Date 24 April 2019



Deputy Upper Tribunal Judge Symes